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No. 82-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FORT PIERCE UTILITIES AUTHORITY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Former Fifth Circuit

RESPONSE OF FLORIDA POWER & LIGHT COMPANY IN SUPPORT OF FLORIDA CITIES' PETITION

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RESPONSE OF FLORIDA POWER & LIGHT COMPANY IN SUPPORT OF FLORIDA CITIES' PETITION

On November 6, 1981 the Former Fifth Circuit issued a decision in *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668. Rehearing applications by the respondent Federal Energy Regulatory Commission ("Commission") and intervenor Florida Cities[1] and a Suggestion for Rehearing En Banc by Florida Cities were denied on January 22, 1982. During the time in which Florida Cities could have petitioned for a writ of *certiorari*, Florida Power & Light Company ("FPL")[2] and Florida Cities reached a settle-

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[1] Florida Cities are the Cities of Gainesville, Homestead, Starke, Key West, Kissimmee, St. Cloud, Tallahassee, the Fort Pierce Utilities Authority, the Lake Worth Utilities Authority, the New Smyrna Beach Utilities Commission and the Sebring Utilities Commission.

[2] FPL's subsidiaries are listed in Petitioner's Brief at p. ii, n.1.

ment of their differences, and, on June 17, 1982, the Commission approved a settlement of the Commission proceedings that had resulted in the proceedings before the Fifth Circuit. As part of these settlements, FPL agreed to seek vacation of the judgment of the Former Fifth Circuit on the ground that the underlying controversy has been rendered moot by settlement. FPL joined Florida Cities in a Motion dated June 17, 1982, which requested the Former Fifth Circuit to vacate its judgment on the ground that the underlying controversy was moot, relying on the doctrine of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). The Commission, in a pleading filed on the same date, confirmed to the Former Fifth Circuit the mootness of the controversy. However, the Former Fifth Circuit denied this Motion on August 16, 1982. Florida Cities therefore have petitioned this Court for a writ of *certiorari* to reverse the action of the Former Fifth Circuit denying the motion to vacate. FPL supports Florida Cities' petition.

FPL's support of Florida Cities' petition is based solely on the *Munsingwear* doctrine, which has been adopted by the Fifth Circuit, *see, e.g.*, *Tyson* v. *Cazes*, 363 F.2d 742, 744 (5th Cir. 1966), and which holds that when a controversy has been mooted by settlement before the time for seeking review has expired, the judgment of the lower court should be vacated and the case dismissed. Vacating the decision on the grounds of mootness does not imply approval or disapproval of the substance of the Former Fifth Circuit's decision. *St. Louis-San Francisco Ry. Co.* v. *Railroad Yardmasters of America, AFL-CIO*, 347 F.2d 983, 984 (5th Cir. 1965). The policy underlying the *Munsingwear* doctrine is that a party that foregoes its right to seek review of a decision because of a settlement should not be bound by the unreviewed decision. That

policy appears to be applicable to this case, and, accordingly, FPL submits that the Florida Cities' petition for writ of certiorari is meritorious.

Respectfully submitted,

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